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THE SUPREME COURT AND UNREASONABLE SEARCHES

The United States Supreme Court decided last June that evidence obtained by tapping telephone wires in violation of a state law may be used in a criminal trial in the federal courts.[1] The question arose in a prosecution for conspiracy to violate the National Prohibition Act. The basis for the prosecution was information largely secured by federal agents who intercepted messages on telephone wires leading to the defendants' homes and offices. Five of the justices of the Supreme Court, in affirming a conviction of the defendants, held that evidence thus obtained was not within the scope of the rule, superimposed by

[1] Olmstead v. United States, 48 Sup. Ct. 564 (U. S. 1928) (Justices Holmes, Brandeis, Butler and Stone dissented).

judicial decisions upon the Fourth and Fifth Amendments, that evidence taken by federal officers in an unreasonable search or seizure is inadmissible in a federal court.[2] Four dissenting justices contended that the rule should be extended to control wire tapping in addition to the more conventional types of police activity.

The significance of the decision in this case arises chiefly from its relation to the other interpretations of the so-called federal rule—which the Supreme Court has from time to time promulgated. The view that the Fourth Amendment was intended as an abrogation of common law rules of evidence concerning the admissibility of relevant matters is said to have been adopted in *Boyd v. United States*.[3] The *Boyd* case involved only the constitutionality of a section of the revenue laws requiring the defendant to produce invoices to be used as evidence. The court said that the use of the invoice as evidence was erroneous and unconstitutional.[4] But there was no discussion of the relation of this dictum to the traditional common law rule that relevant evidence is admissible without regard to the methods by which it was obtained.

The Supreme Court first gave this relation its attention in *Adams v. People of New York*.[5] Although that case dealt chiefly with the admissibility of evidence seized during an unreasonable search by New York state officers, it approved the traditional common law rule in quite general terms—and suggested the necessity for limiting the application of the rule in the *Boyd* case. For some years thereafter the ascendency of the *Boyd* case dictum seemed in doubt. In *Hale v. Henkel*[6] the question of the admissibility of evidence was not directly considered. The case concerned the grounds on which an officer of a corporation might refuse to testify at a proceeding under the Sherman Act. But the court thought a too sweeping use of the subpoena did constitute an unreasonable search and cited both the *Boyd* decision and the *Adams* case.[7] The case of *United States v.*

[2] For a discussion of the rule, generally, see Comment (1927) 36 YALE L. J. 536, and authorities there cited.

[3] 116 U. S. 616, 6 Sup. Ct. 524 (1886). In Ex Parte Jackson, 96 U. S. 727, 732 (1877), a dictum to some extent foreshadows the court's attitude in the Boyd case. But the holding of the court is on the constitutionality of a statute barring lottery circulars from the mails, and the court expressly excludes any question on the admissibility of evidence.

[4] 116 U. S. at 638, 6 Sup. Ct. at 536 (1886).

[5] 192 U. S. 585, 24 Sup. Ct. 372 (1904).

[6] 201 U. S. 43, 26 Sup. Ct. 370 (1906).

[7] Both cases were again cited in American Tobacco Company v. Werckmeister, 207 U. S. 284, 28 Sup. Ct. 72 (1907), where the court held that the inaccurate use of a writ of replevin did not prevent the use of evidence thereby obtained. The question was raised incidentally in Holt v. United States, 218 U. S. 245, 31 Sup. Ct. 2 (1910). Justice Holmes declared

Weeks,[8] however, elevated the dictum of the *Boyd* case to the dignity of an actual holding. There it was decided that evidence secured in violation of the Fourth and Fifth Amendments could not be retained by the prosecution if the defendant applied for its return before trial. This limitation was thought to reconcile the *Boyd* and *Adams* decisions.

But even this strong reiteration of the *Boyd* dictum and attempted reconciliation of the *Adams* case failed to settle the doctrine. Justice Holmes showed new leanings toward the traditional common law rule in *Schenck v. United States*,[9] where he said,

"Notwithstanding some protest in argument, the notion that evidence even directly proceeding from the defendant in a criminal proceeding is excluded in all cases by the Fifth amendment, is plainly unsound." [10]

And Justice Day in *Stroud v. United States* [11] unequivocally refused to exclude evidence secured by opening letters written by the defendant while in the penitentiary.[12]

The rule of the *Weeks* case received its strongest confirmation in three cases decided soon after *Stroud v. United States*.[13] But almost immediately the rule was again curbed by the decision in *Burdeau v. McDowell*,[14] which declared that evidence stolen

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that even were a defendant ordered to exhibit evidence in a criminal trial "even if the order goes too far the evidence, if material, is competent."

[8] 232 U. S. 383, 34 Sup. Ct. 341 (1914).

[9] 249 U. S. 47, 39 Sup. Ct. 247 (1919). Shortly before the Schenck case it had been held in Perlman v. United States, 247 U. S. 7, 38 Sup. Ct. 417 (1918), that the Weeks case could not be invoked to restrain the government from using certain exhibits before a grand jury, which had been voluntarily placed in the hands of the court by the defendant in a previous suit.

[10] 249 U. S. at 50, 39 Sup. Ct. at 248 (1919).

[11] 251 U. S. 15, 40 Sup. Ct. 50 (1919).

[12] "In this instance the letters were voluntarily written. No threat or coercion was used to obtain them, nor were they seized without process. They came into the possession of officials of the penitentiary under established practice, reasonably designed to promote the discipline of the institution. Under such circumstances there was neither testimony required of the accused, nor unreasonable search and seizure in violation of his constitutional rights." 251 U. S. at 21, 40 Sup. Ct. at 53 (1919).

[13] Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 Sup. Ct. 182 (1920) (deciding against the use of copies of unreasonably seized evidence); Gouled v. United States, 255 U. S. 298, 41 Sup. Ct. 261 (1921) (excluding evidence taken by stealth from the defendant, by an army intelligence officer); Amos v. United States, 255 U. S. 313, 41 Sup. Ct. 266 (1921) (holding that the defendant's wife did not waive "constitutional rights," since the presence of the officers was "implied coercion").

[14] 256 U. S. 465, 41 Sup. Ct. 574 (1921).

by anyone other than a federal agent was admissible in a federal court.[15]

In spite of his dissent in *Burdeau v. McDowell,* Justice Holmes gave the opinion of the court in *Hester v. The United States,*[16] in which he refused to extend the rule in the *Weeks* case to exclude the testimony of federal officers who concealed themselves in open fields near the defendant's house, the distinction between open fields and houses, so far as the Fourth Amendment was concerned, being "as old as the common law." Next came *Carroll v. United States,*[17] in which Chief Justice Taft found probable cause for the search of an itinerant automobile, and in which he declared for an historical interpretation of the Fourth Amendment.[18] The decision in the *Agnello* case frowned on a too liberal construction of a "search incidental to a lawful arrest," but at the same time held that evidence erroneously taken from one defendant could be used against other defendants in the same case.[19]

Justice Stone, deciding in *McGuire v. United States*[20] that the illegal destruction of liquor by federal officers could not prevent the use of the amount salvaged as evidence, refused to read the fiction of trespass *ab initio* into the rule of the *Weeks* case. He said a prosecution was more than a game which might be lost by a technical checkmate.[21] But, on the other hand, the court in *Byars v. United States,*[22] alert to avoid "judicial sanction of equivocal methods," condemned an unreasonable search by state officers because the participation of federal officers was too apparent. Yet soon afterward the court in *Lee v. United States*[23] found the evidence seized from a boat at sea acceptable on grounds of probable cause. Justice Brandeis said, obiter, that the use of a search light to disclose the con-

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[15] Justice Holmes with whom Justice Brandeis concurred, filed a dissenting opinion on grounds akin to those each expressed in the Olmstead case.

[16] 265 U. S. 57, 44 Sup. Ct. 445 (1924).

[17] 267 U. S. 132, 45 Sup Ct. 280 (1925).

[18] The Chief Justice reiterates this dictum in the Olmstead case. See Olmstead v. United States, *supra* note 1, at 568.

[19] Agnello v. United States, 269 U. S. 20, 46 Sup. Ct. 4 (1925). See Comment (1926) 35 YALE L. J. 612.

[20] 273 U. S. 95, 47 Sup. Ct. 259 (1927).

[21] "The arguments in behalf of the accused concern primarily the personal liability of the officers making the search and seizure for their unlawful destruction of part of the liquor seized. They have at most a remote and artificial bearing upon the right of the government to introduce in evidence the liquor seized under a proper warrant." *Ibid.* 98, 47 Sup. Ct. at 260. See also Notes (1927) 5 N. C. L. REV. 264; (1927) 75 U. OF PA. L. REV. 573.

[22] 273 U. S. 28, 47 Sup. Ct. 248 (1927).

[23] 274 U. S. 559, 47 Sup. Ct. 746 (1927).

tents of the boat was not a "search" prohibited by the constitution.[24] The last case, in point of time, before the *Olmstead* decision, was *Gambino v. The United States*,[25] where the court held that since the local enforcement act in New York had been repealed, a state trooper making a prohibition search was subject to the limitations imposed by the *Weeks* case. The court reached this result in spite of a dictum in the *Weeks* case quite to the contrary.[26]

It is difficult from a survey of the cases to know exactly what is the tendency of the Supreme Court in its periodic interpretations of the federal rule. A number of cases indicate a decided disposition to limit the rule wherever possible.[27] But the *Gambino* case and the *Byars* case show that the court under some circumstances will resort to liberal interpretations to give the rule a wide effect. That there has been a procession of inconsistencies is undeniable. If anything could have been predicated as a result of the cases when the *Olmstead* question came before the court, it was that there would be a strong dissent, whatever the majority decided. The court has, since the *Boyd* case, made almost any prophecy beyond this impossible.

The contention of the minority in the *Olmstead* case, that the rule should be extended to cover wire tapping, seems logical if the rule is to be applied at all. Since the court does not regard the decision as overthrowing the rule, it will be interesting to see its future. Another exception is here engrafted on the doctrine that information illegally obtained is inadmissible in evidence. The suggestion of the minority that "dirty business" of this type should be severely punished will readily be agreed to. But the history of the federal rule indicates that practical convenience and logical consistency will be better served if relevant evidence is held admissible and the offendors who obtained it are dealt with in less devious ways.

R. J. S.

THE POWER OF ARBITRATORS TO AWARD MONEY DAMAGES

A recent decision by Judge Mack in a federal district court raises the question as to the power of arbitrators, under a

[24] The decision in Marron v. United States, 48 Sup. Ct. 74 (U. S. 1927), regards evidence, although otherwise tainted, admissible by the coincidence of an arrest in the case. Segurola v. United States, 48 Sup. Ct. 77 (U. S. 1927), refuses to consider the question of admissibility in the absence of a preliminary motion according to the procedure prescribed in the Weeks case.

[25] 48 Sup. Ct. 137 (U. S. 1927). See Comment (1928) 37 YALE L. J. 784.

[26] See Comment (1928) 37 YALE L. J. 784, 789.

[27] For a detailed analysis of these limitations as enforced by inferior federal courts see Comments (1927) 36 YALE L. J. 536; (1927) 36 YALE L. J. 988.

general arbitration clause, to award monetary damages, where they admittedly have jurisdiction to determine responsibility.[1] The dispute arose out of a contract executed in May, 1922, between the Mead-Morrison Manufacturing Co. and Bear Tractors, Inc. for the manufacture, sale and delivery in installments over a long period of time of five hundred tractors. The arbitration clause under which the dispute was submitted was a part of this contract of sale, and provided:

"If for any reason any controversy or difference of opinion shall arise as to the construction of the terms and conditions of this contract or as to its performance . . . the matter in dispute shall be settled by arbitration . . . and the decision . . . shall be final and binding upon the parties and a condition precedent to any suit upon or by reason of such controversy or difference."

Bear Tractors, Inc. was declared bankrupt in May, 1924. The trustee in bankruptcy, alleging that the Mead-Morrison Co. failed to deliver tractors in accordance with the terms of the agreement, demanded arbitration. A majority of the arbitrators decided that there was a breach of contract and awarded to the trustee as damages a total of $864,792.35, including costs. Suit by the trustee to confirm the award was transferred from the New York court to the federal district court on the ground of diversity of citizenship. The award in so far as it determined that there was a breach of contract was affirmed; but the grant of damages was vacated on the ground that the arbitrators had no power under the contract to determine the amount.

This ruling is interesting in the light of the purposes and tendencies of arbitration. The recent growth in arbitration is the result of an attempt to create an efficient extra-judicial system of settling commercial disputes. The passage of the numerous statutes making arbitration agreements specifically enforceable[2] was effected by strong pressure on the part of business

[1] Matter of Marchant v. Mead-Morrison Manufacturing Co., decided May 23, 1928, in the Federal District Court of the Southern District of New York.

[2] Specific enforcement of agreements to arbitrate present and future disputes is provided for by the United States Arbitration Act (1925), the New York Arbitration Law (1920) and by the arbitration statutes of New Jersey (1923), Massachusetts (1925), Oregon (1925), Territory of Hawaii (1925), California (1927), Pennsylvania (1927) and Louisiana (1928). See Sturges, *Arbitration Under the New Pennsylvania Arbitration Statute* (1928) 76 U. OF PA. L. REV. 345.

The Uniform Arbitration Act adopted by Nevada (1925), Utah (1927), Wyoming (1927) and North Carolina (1927) does not embrace future disputes clauses. For criticism, see Sturges, *Arbitration Under the New North Carolina Statute—The Uniform Arbitration Act* (1928) 6 N. C. L. REV. 363. Future disputes clauses are irrevocable in most foreign countries. See YEAR BOOK ON COMMERCIAL ARBITRATION, 1113-1142, Annex IV (1927).

interests, which desired a more expeditious and less costly determination of their differences by men expert in the particular commercial field concerned.[3] The ancient hostility of judicial tribunals toward such agreements has given way to a more sympathetic attitude.[4] The courts have quite generally favored this development by a liberal construction [5] of the statutes and the agreements, and by a refusal to meddle with the awards of arbitrators except in exceptional circumstances. The court in the instant case admits the desirability of commercial arbitra-

[3] See Sturges, *Commercial Arbitration or Court Application of Common Law Rules of Marketing?* (1925) 34 YALE L. J. 480, 480-484; Sayre, *Development of Commercial Arbitration Law* (1928) 37 YALE L. J. 595, 615; Wheless, *Arbitration As a Judicial Process* (1924) 30 W. VA. L. Q. 209, 209-211.

[4] "The jealousy with which, at one time, courts regarded the withdrawal of controversies from their jurisdiction by the agreement of parties has yielded to a more sensible view, and arbitrations are now encouraged as an easy, expeditious, and inexpensive method of settling disputes, and as tending to prevent litigation." Fudickar v. Guardian Mutual Life Ins. Co., 62 N. Y. 392, 399 (1875). See Robertson v. Marshall, 155 N. C. 167, 171, 71 S. E. 67, 68 (1911).

[5] Thus, the supreme courts of Colorado and Washington have held that a future-disputes clause in a written contract is valid and irrevocable, although the arbitration statutes do not expressly embrace future-disputes agreements. Ezell v. Rocky Mountain Co., 76 Colo. 409, 232 Pac. 680 (1925); State v. Everett, 144 Wash. 592, 258 Pac. 486 (1927).

A striking example of liberality of construction is to be found in Matter of Am. Eagle Fire Ins. Co. v. New Jersey Ins. Co., 240 N. Y. 398, 148 N. E. 562 (1925). The arbitration clause provided that if any of the arbitrators should cease to act as such "through death, resignation, or otherwise," the party selecting him should appoint a substitute from a certain list. The court found that the resignation of one of the arbitrators was unreasonable and calculated to frustrate the intention of the parties as it existed when the agreement was made, and the necessity of appointing a substitute was dispensed with. As the court stated, "The letter [of the agreement] should be enlarged within legitimate bounds, rather than limited, when the end in view may thereby be more effectually accomplished."

Although not specifically provided for, the award of interest was held within the terms of submission ("all actions and causes of actions, claims and demands whatsoever now pending") in Matter of Burke, 191 N. Y. 437, 84 N. E. 405 (1908). In Tri-State Transportation Co. v. Stearns Bros., 195 N. C. 720, 143 S. E. 473 (1928), the award of costs was affirmed, where the agreement simply referred "all matters involved" in a dispute over an alleged balance due for labor done. But *cf.* Garitee v. Carter, 16 Md. 309 (1860).

Cf. Forwood & Co. v. Watney, 49 L. J. (N. S.) C. L. 447 (1880); Heyworth v. Hutchinson, L. R. 2 Q. B. 447 (1867); Monongahela Navigation Co. v. Fenlon, 4 W. & S. 205 (Pa. 1842); Gerry v. Eppes, 62 Me. 49 (1873); Richards v. Smith, 33 Utah 8, 91 Pac. 683 (1907); Matter of Smith Fireproof Construction Co. v. Thompson Starrett Co., 247 N. Y. 277, 160 N. E. 369 (1928). But *cf.* Dodds v. Hakes, 114 N. Y. 260 (1889); Lauman v. Young, 31 Pa. 306 (1858); Matter of Young v. Crescent Development Co., 240 N. Y. 244, 148 N. E. 510 (1925).

tion. Yet, by a narrow and technical construction of the words in the arbitration clause, it reaches a result that may impede its development.

In cases of agreements for the arbitration of existing disputes, the power of the arbitrators to award money damages as an incident to the determination of responsibility has seldom been disputed.[6] Judge Mack postulates a "vital distinction" between such agreements and those for the arbitration of future disputes. But the power to award money damages appears to have been generally assumed in both situations, without distinction.[7] In England the issue, in the case of an agreement to arbitrate future disputes, was raised and definitely settled in *Heyworth v. Hutchinson.*[8] A contract for the purchase and sale of wool provided: "The wool to be guaranteed about similar to samples . . . and if any dispute arises, it shall be decided by the selling brokers, whose decision shall be final." The wool was rejected as not per sample. The arbitrators decreed that the buyer take

[6] In Slocum v. Damon, 1 Pin. 520 (Wis. 1845), the arbitrators were to decide "whether the said Slocum is liable for the damages occasioned to the horse in question, with costs to abide the event." An award of $70 and costs was affirmed. The court said: "It can scarcely be presumed that the parties did not intend to submit the amount of liability with the question of liability. It is not presumable that the parties would incur costs and expenses in merely having a legal question of liability tried, and then have another trial for the amount of such liability. Such a construction is to be given to the submission, as to give it full effect, and to meet the intention of the parties, which no doubt was, to have their difficulties settled without further litigation and expense."

In Colcord v. Fletcher, 50 Me. 398 (1862), the court voiced a similar view: "It is apparent that the parties intended to refer for final determination and adjustment a claim, which plaintiff made against defendant for money which he had received for insurance, and not merely the abstract question whether there was any indebtedness, leaving the amount to be otherwise determined. When a 'claim' is submitted to any judicial tribunal, it involves necessarily the determination of the legality and the amount, unless there is an express limitation of the power to adjudicate."

In Waite v. Barry, 12 Wend. 375 (N. Y. 1834), a submission of a "difference between them respecting the one-eighth part of a lottery ticket, and the prize thereunto" was held to embrace the question of payment, as well as the sale of the ticket and responsibility. See also Cobb v. Dolphin Mfg. Co., 108 N. Y. 463 (1888). The power to award money damages, as distinct from interest and cost, was not questioned in Tri-State Transportation Co. v. Stearns Bros.; Garitee v. Carter; Matter of Burke, all *supra* note 5; Matter of Wheat Export Co., 185 App. Div. 723, 173 N. Y. Supp. 679 (1st, dept. 1919), *aff'd*, 227 N. Y. 595, 125 N. E. 926 (1919); Johnson v. Noble, 13 N. H. 286 (1842).

[7] Thus, for example, in Itoh & Co. Ltd. v. Boyer Oil Co. Inc., 198 App. Div. 881, 191 N. Y. Supp. 290 (1st. dept. 1921), where $24,034.85 was awarded under a clause providing that: "Any dispute arising out of this contract to be settled by arbitration in New York," the power to award damages was not questioned.

[8] L. R. 2 Q. B. 447 (1867).

the wool at a certain abatement in price. The buyer contended that the award was invalid. Cockburn, C. J., in affirming the award said:

"But the parties have introduced a clause that if any dispute shall arise it shall be decided by the selling brokers. What is the effect of that provision? Mr. James would confine it to the simple case of deciding whether or not the wools were about similar; but that is far too narrow a construction, and it would lead to great inconvenience so to limit it. . . . It is quite clear that it was intended that, if the wools should turn out not about similar to samples, the brokers should have power to decide how far they were inferior, and what reduction was to be made in consequence in the price, so as to prevent any litigation in the matter."

In the New York case of *Matter of S. M. Goldberg Enterprises*,[9] a similar view was voiced. An employee who had been discharged sued for damages. The employer demanded arbitration pursuant to a provision in the contract of employment.[10] The court upheld his demand and said:

"In the instant case I think the master should be permitted to proceed in affirmance of the contract, and if the arbitrators should decide that the discharge was not justified, they could then proceed and fix the damages quite as efficiently as a jury."

In neither of these cases was the power to award damages specifically provided for in the arbitration agreements.

A contrary view does not seem to have been voiced by any court or commentator. The court in the instant case cites two decisions which, it is submitted, are not in point. In *Young v. Crescent Development Co.*[11] the court held merely that the particular dispute was not within the scope of the arbitration clause.[12] The same point was involved in the decision in *Somerset Borough v. Ott.*[13] In neither case was it decided that dam-

[9] 130 Misc. 887, 225 N. Y. Supp. 513 (Sup. Ct. 1927), *aff'd*, 222 App. Div. 729, 225 N. Y. Supp. 909 (1st. dept. 1927).

[10] This clause read: "If any dispute or difference shall arise between the parties herein, no suit shall be commenced by either one against the other. Such disputes and differences shall, however, be submitted to arbitration in accordance with the laws of the state of New York."

[11] 240 N. Y. 244, 148 N. E. 510 (1925).

[12] The arbitration clause of the building contract provided: "All questions that may arise under this contract and in the performance of the work thereunder shall be submitted to arbitration at the choice of either of the parties hereto." The contractor claimed damages because the owner had delayed him in the performance of his contract. The court said: "I do not think that the arbitration clause in the contract should be interpreted as covering and including *such a claim* as the one made against appellant for breach of the contract."

[13] 207 Pa. 539, 56 Atl. 1079 (1904). The agreement provided that

ages could not be awarded when the dispute itself was embraced in the particular arbitration clause.[14]

In explaining his unusually strict interpretation of the powers of the arbitrators under the future-disputes clause of the instant contract, Judge Mack attempts to draw the distinction, noted above, between an agreement for the arbitration of existing disputes and one for the settlement of disputes that may arise in the future, from the relations created by the contract of which the arbitration clause is a part. In the former, the parties know what they are facing and appreciate the nature of their dispute, while "in the latter they are aware only that disputes of many kinds, the nature of which is but vaguely known, may arise in the future. Because of this difference of context, it may well be that even the same words should be given a different meaning in the two cases, broader in the former than in the latter." The validity of the distinction seems doubtful. As a matter of plausibility, parties involved in an existing dispute are less likely to intend a broad construction of language which has been employed in connection with a specific situation than parties who use the same language in an effort to express a general working principle to apply to the operation of a continuing general contract. But more important still is the fact that business men entering into a contract to arbitrate future disputes do forsee the possibility of damages. When they contemplate the *settlement* of such disputes, their interest is centered on the pecuniary loss that may result therefrom. They are not concerned over the breach divorced from its consequences. Nor do they intend, in the absence of special reasons, to take two steps in the solution of such disputes: one for the determination of a breach and the other for damages. If the law is to require arbitration clauses in commercial contracts to cover contingencies with meticulous accuracy, it cannot but impede the growth of a successful system of arbitration.

The apparent motive behind the court's decision is the fear that adequate protection against injustice cannot be secured

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the engineer "shall be referee in all cases to determine the amount, quality, acceptability and fitness of the several kinds of work which are to be paid for under this contract, and to decide upon all questions which may arise as to the fulfillment of said contract on the part of said contractor." The court held that the engineer had no power, under this clause, to *pass on a claim* by the borough against the contractor for damages for non-fulfilment of the contract.

[14] It should be noted that the court held that the particular dispute was embraced in the arbitration clause and that the court affirmed the award in so far as it established "that defendant did not perform its obligation to deliver tractors in accordance with the terms of the agreement and the orders for delivery given in pursuance thereof, and thereby was guilty of a gross breach of contract."

unless the power of the arbitrators is kept within bounds by a strict interpretation of the powers conferred upon them by the arbitration agreement.[15] It is generally held that the award of arbitrators, if within the terms of the submission, is final and conclusive, and is not reviewable by the courts for errors of fact, or, in many jurisdictions, for errors of law.[16] But the protection of due notice and fair hearing has been thrown about arbitration proceedings.[17] And "fraud" and "misconduct" on the part of the arbitrators are grounds for impeaching an award.[18] These safeguards would seem to be sufficient to secure

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[15] Thus it says: "If the parties really desire, as to all kinds of disputes, completely to give up the rights and remedies, offensive and defensive, that have been created in the course of the centuries' long development of our law, they may do so; but such an intent and the extent thereof should, as it readily can, at least be made clear."

[16] This is the common law view. Johnson v. Noble, *supra* note 6. See (1928) 2 TEMPLE L. Q. 175. This is also the view under the statutes in New York, New Jersey, Hawaii, California, and the federal courts. The Uniform Arbitration Act, however, provides that questions of law may be reviewed by the courts; the statutes of Illinois, Pennsylvania, Massachusetts, and England are similar. See Sayre, *Development of Commercial Arbitration Law* (1928) 37 YALE L. J. 595, 613; *cf.* Wheless, *Arbitration as a Judicial Process* (1924) 30 W. VA. L. Q. 209, 227-228; Matter of Wheat Export Co. Inc., *supra* note 6; Fudickar v. Guardian Mutual Life Ins. Co., *supra* note 4; Gerry v. Eppes, *supra* note 5. Where arbitrators are to decide in accordance with the rules of law, their decision in that respect is everywhere open to review. See Dodds v. Hakes, *supra* note 5. In Connor v. Simpson, 104 Pa. 440 (1883), the award was set aside because the arbitrator refused to settle a question of law that had been submitted. In Matter of Wenger v. Propper S. H. Mills, 239 N. Y. 199, 146 N. E. 203 (1924), the arbitrators had jurisdiction even though it seems that there would have been no action at law.

[17] *Cf.* Curran v. Philadelphia, 264 Pa. 111, 107 Atl. 636 (1919); North Braddock Borough v. Corey, 205 Pa. 35, 54 Atl. 486 (1903).

[18] Grounds for vacating an award under the New York Statute (N. Y. C. P. A. § 1457) are as follows:

"1. Where the award was procured by corruption, fraud, or other undue means.

"2. Where there was evident partiality or corruption in the arbitrators or either of them.

"3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

"4. Where the arbitrators have exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award upon the subject matter submitted was not made."

Awards may be modified or corrected (N. Y. C. P. A. § 1458):

"1. Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing, or property referred to in the award.

"2. Where the arbitrators have awarded upon a matter not submitted

for business as equitable and just a settlement of its disputes as could be secured in the regular courts of justice. Where an award cannot be impeached on any of these grounds, it seems undesirable to have the courts review the merits of the controversy by giving a narrow interpretation to the grant of jurisdiction contained in the arbitration agreement. Business men, when entering into such agreements, intend them to be interpreted liberally, and it is only after a dispute has arisen, in which those on one side find a technical advantage in litigation, that they become advocates of strict construction.

In the instant case the court found that the particular dispute was one within the terms of the arbitration agreement. The agreement stated that the arbitrators were to "settle" such disputes, their decision to be "final and binding." To hold that the award of damages is not a necessary concomitant of such a power is a refinement foreign to the spirit in which arbitration agreements are made. The growth of commercial arbitration under liberal statutes and sympathetic courts has proved satisfactory to the commercial interests concerned. No reason has been adduced for a change of policy at this time.

WHAT IS "GENERAL LAW" WITHIN THE DOCTRINE OF SWIFT v. TYSON?

By what now appears to have been a misconception[1] of the purpose of section 34 of the Judiciary Act of 1789,[2] which makes "the laws of the several states . . . rules of decision in trials at common law in the courts of the United States," Justice Story, in *Swift v. Tyson*,[3] enunciated a doctrine which has never ceased to distress theorists[4] while being constantly applied and ex-

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to them, not affecting the merits of the decision upon the matters submitted.

"3. Where the award is imperfect in a matter of form not affecting the merits of the controversy, and, if it had been a referee's report, the defect could have been amended or disregarded by the court."

The federal statute is substantially similar. See Poor, *Arbitration Under the Federal Statute* (1927) 36 YALE L. J. 667, 669. The making of an independent investigation of the facts by an arbitrator has been held to justify the setting aside of the award. Berizzi Co. v. Krausz, 239 N. Y. 315, 146 N. E. 436 (1925), criticized in (1925) 34 YALE L. J. 905. See Strong v. Strong, 63 Mass. 560 (1852).

[1] See, Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. REV. 49, 81 *et seq.*, based on original memoranda.

[2] 44 Stat. 935 (1926). See 28 U. S. C. § 725 (1928) for comprehensive note on the whole problem.

[3] 16 Pet. 1 (U. S. 1842). The case involved negotiable paper, but the opinion went far beyond to include "general commercial law."

[4] For a full criticism of the "chaos" resulting from the doctrine, see Meigs, *Decisions of the Federal Courts on Questions of State Law* (1911)

tended by judges.[5] The distinction was there drawn, as to non-statutory questions,[6] in cases where jurisdiction of the federal courts depends on diversity of citizenship, between "local law," in which the federal courts are bound [7] to follow the decisions [8] of the highest courts of the state where the issue arose, and "general commercial law," in which they should form independent judgments.[9] The chief objection to the doctrine is of course that there may be two rules in force in the same state as to one question, depending on whether suit is brought in the federal or state court.[10]

The recent case of *Black & White Taxi. & T. Co. v. Brown*

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45 AM. L. REV. 47; see also GRAY, THE NATURE AND SOURCES OF THE LAW (2d. ed. 1921) 249-259; Carpenter, *Court Decisions and the Common Law* (1917) 17 COL. L. REV. 593, 602; Rand, *Swift v. Tyson versus Gelpcke v. Dubuque* (1895) 8 HARV. L. REV. 328. The most recent denunciation of the doctrine is contained in Frankfurter, *Distribution of Judicial Power between United States and State Courts* (1928) 13 CORN. L. Q. 499, 524 *et seq.*, with especial reference to the case under discussion here, which he terms "its extreme limit." But as to this point, see *infra* note 16. The doctrine has received energetic support from Prof. Henry Schofield; see articles cited *infra* notes 30 and 31.

[5] Judges have by no means been unanimous. There were vigorous dissenting opinions in the following important cases: Baltimore & O. R. R. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914 (1893); Kuhn v. Fairmont Coal Co., 215 U. S. 349, 30 Sup. Ct. 140 (1910). In Salem Co. v. Manufacturers' Finance Co., 264 U. S. 182, 44 Sup. Ct. 266 (1924), two judges concurred in the result while disapproving of the argument.

[6] Statutes alone were considered by Story within the meaning of the word "laws" in the Judiciary Act. For a full discussion of the problem of how far a federal court will follow state decisions on the state's statutory law, see Comment (1928) 37 YALE L. J. 1121.

[7] It is open to question whether they are "bound" under the provision of the Judiciary Act, or as a mere matter of comity. See *infra* note 49.

[8] The nature of the state decisions, and their relation in time to the accrual of rights, are important factors in the application of the doctrine, as is also the character of the tribunal. See Note (1926) 40 HARV. L. REV. 310. The rule must rest on a settled line of decisions, not be merely discussed or "foreshadowed." Rowan v. Galveston, 13 F. (2d) 257 (S. D. Tex. 1926).

[9] The early rule seems to have held decisions of state courts as binding as statutes. Mandeville v. Riddle, 1 Cranch 290 (U. S. 1803). But Story had some basis of authority for his interpretation. *Cf.* Jackson v. Chew, 12 Wheat. 153, 167 (U. S. 1827). For motives in his decision see GRAY, *op. cit. supra* note 4, at 253.

[10] "What is to be said of a civilized society where, upon precisely the same state of facts a court on one side of the street will decide in favor of plaintiff, and a court on the other side of the street will decide in favor of the defendant?" See Hornblower, *Conflict between Federal and State Decisions* (1880) 14 AM. L. REV. 211, 223. One of the most notable examples of this conflict is on the question of negotiable paper raised in Swift v. Tyson itself, the New York courts having continued to follow their own rule until the passage of a Negotiable Instruments Law in 1897 in accord with the federal rule. *Cf. infra* note 31.

& Yellow Taxi. & T. Co. [11] shows the doctrine[12] still apparently as firmly settled as ever, but still as capable of arousing a determined opposition. In this case the plaintiff, a Kentucky corporation, by reincorporating in a neighboring state[13] and thereupon bringing suit in the federal court,[14] was able to secure enforcement of a contract of a type that had long been considered invalid by the Kentucky courts as contrary to public policy.[15] The majority of the Supreme Court held that the question was one of "general law" as to which they were not bound by the state decisions.[16] Justice Holmes, in a dissenting opinion, concurred in by Justices Stone and Brandeis, denounced

[11] 276 U. S. 518, 48 Sup. Ct. 404 (1928), *aff'g* 15 F. (2d) 509 (C. C. A. 6th, 1926).

[12] The doctrine applies as to the substantive law involved though this was a suit in equity. *Cf.* Guffey v. Smith, 237 U. S. 101, 35 Sup. Ct. 526 (1915); Edward Hines Yellow Pine Trustees v. Martin, 268 U. S. 458, 45 Sup. Ct. 543 (1925).

[13] The court held that the plaintiff's motives would not be enquired into and that the reincorporation was not collusive. On this aspect of the case, see (1927) 36 YALE L. J. 877.

[14] Such abuses of the federal jurisdiction are undoubtedly encouraged by the doctrine of Swift v. Tyson. *Cf.* Little v. Giles, 118 U. S. 596, 7 Sup. Ct. 32 (1886). In Stewart v. Lansing, 104 U. S. 505 (1881), a non-resident plaintiff was apparently created out of thin air. The instant case shows in a striking way how the doctrine "makes the administration of justice a game, where the event depends on the skill of the players." 2 HARE, AMERICAN CONSTITUTIONAL LAW (1889) 1119.

[15] *Cf.* McConnell v. Pedigo, 92 Ky. 465, 18 S. W. 15 (1892). The contract involved was with a Kentucky railroad, granting the plaintiff taxicab company exclusive privileges in soliciting patronage at the former's station.

[16] The court's decision that the contract was valid is in accord with the authorities. See Note (1908) 16 L. R. A. (N. S.) 777. But whether the court was justified in holding the question one of "general law," on which it could exercise its independent judgment, is not so clear. Contracts, especially those made by carriers, are usually considered general questions. New York Cent. R. R. v. Lockwood, 17 Wall. 357 (U. S. 1873). And there is one other instance where a contract of the kind under discussion was considered as a question of "general law." Skaggs v. Kansas City Terminal R. R., 233 Fed. 827 (W. D. Mo. 1916). But that case did not arise by diversity of citizenship and should not control. On the other hand, contracts involving real property, especially where the state's public policy is said to be at stake, are often treated as local questions. Hartford Fire Ins. Co. v. Chicago M. & St. P. R. R., 175 U. S. 91, 20 Sup. Ct 33 (1899). The instant case might perhaps come within that category, as Justice Holmes shows in his dissenting opinion: "I should have supposed that what arrangements could or could not be made for the use of a piece of land was a purely local question, on which if on anything the state courts should be taken to declare what the state wills." But this argument was apparently brought in as an afterthought by Justice Holmes, and does not appear to be very well supported. If the term "general law" is ever to be applied, it would seem that it could be applied here without inconsistency.

as "a subtle fallacy" the theory of "a transcendental body of law outside of any particular state, but obligatory within it," [17] to which the majority were appealing in deciding the question independently of the state rule.

Though the courts in making such independent judgments assert that there is no federal common law,[18] and claim instead that they are expressing the state's own common law,[19] it seems clear that they are in fact looking to some "transcendental body of law" when they apply the *Swift v. Tyson* rule. And whether this be called "general commercial law," [20] "general jurisprudence," [21] "general rules of the common law," [22] or "general law," as in the case under discussion, there is little use in denying its existence on a theoretical basis,[23] when practically the courts are constantly appealing to it.[24] Confining themselves at first

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[17] *Cf.* Justice Holmes' dissenting opinions in Kuhn v. Fairmont Coal Co., *supra* note 5, at 370, 30 Sup. Ct. at 147, and in Southern Pacific Co. v. Jensen, 244 U. S. 205, 222, 37 Sup. Ct. 524, 531 (1917).

[18] See Wheaton v. Peters, 8 Pet. 591, 658 (U. S. 1834). "The conception of a federal common law has long since been exploded." Note (1926) 40 HARV. L. REV. 310, n. 1. Despite this fact, it still has many defenders. For a full treatment of the subject see Von Moschzisker, *Common Law and our Federal Jurisprudence* (1925-1926) 74 U. OF PA. L. REV. 109, 270, 367. A judge may dodge the obnoxious term by some such phrase as "interstate common law." See Brewer, J., in Kansas v. Colorado, 206 U. S. 46, 98, 27 Sup. Ct. 655, 667 (1907).

[19] See Snare & Triest Co. v. Friedman, 169 Fed. 1, 11 (C. C. A. 3d, 1909): "The jurisdiction exercised by those federal courts in such cases is concurrent and not subordinate, and they are called upon to exercise, and do exercise, an independent judgment as to what the law of the state may be." *Cf.* 2 WILLOUGHBY, CONSTITUTIONAL LAW (1910) 1039.

[20] See Swift v. Tyson, *supra* note 3, at 19; Brooklyn R. R. v. Nat. Bank, 102 U. S. 14, 31 (1880).

[21] See Lake Shore R. R. v. Prentice, 147 U. S. 101, 106, 13 Sup. Ct. 261, 262 (1892).

[22] See Baltimore & O. R. R. v. Baugh, *supra* note 5, at 379, 13 Sup. Ct. at 918.

[23] General law "has no existence except in the brain of the federal judges in their conception of what the law of the states should be." Field, *dissenting*, in Baltimore & O. R. R. v. Baugh, *supra* note 5, at 403, 13 Sup. Ct. at 928. "The theoretic view of a general commercial law . . . does not exist and is not to be found in the books." 2 HARE, *op. cit. supra* note 14, at 1108. "The doctrine of the federal courts as to the general commercial law is without justification and without defenders." Carpenter, *op. cit. supra* note 4, at 603.

[24] It is Gray's theory that "the law is composed of the rules which the courts . . . lay down for the determination of rights and duties." GRAY, *op. cit. supra* note 4, at 84. Beale's theory is one of "a body of scientific principle." 1 BEALE, CONFLICT OF LAWS (1916) § 117. Both theories apparently could be brought to bear against Holmes's contention in the case under discussion that "there is no such body of law." But there is no doubt that, as applied, "the doctrine is anomalous and not explicable" by any theory. Carpenter, *loc. cit. supra* note 23.

to a sort of "law merchant" [25] of usages common to the commercial world [26] the federal courts have applied their own rules in an increasing field,[27] without regard to the non-statutory law of a state, feeling "dictated . . . by the importance of national certainty of the law in the broader field of general jurisprudence." [28]

It is hardly within the scope of this comment to discuss the advantages and disadvantages of this practice.[29] The claim for uniformity [30] is not entirely justified.[31] If it were, and if the

[25] See Von Moschzisker, *op. cit. supra* note 18, at 283; DOBIE, FEDERAL PROCEDURE (1928) 573.

[26] See Brooklyn R. R. v. Nat. Bank, *supra* note 20, at 32.

[27] The extension of the doctrine is threefold:

1. As shown by the development of the terms used almost any subject, however far from commercial law, may come within the scope of "general law." Among these are questions of tort responsibility in the field of negligence. New York N. H. & H. R. R. v. Fruchter, 271 Fed. 419 (C. C. A. 2d, 1921), *rev'd* on other grounds, 260 U. S. 141, 43 Sup. Ct. 38 (1922) (dealing with the "attractive nuisance doctrine"). And questions of procedure. Hemingway v. Ill. Cent. R. R., 114 Fed. 843 (C. C. A. 5th, 1902) (dealing with burden of proof.)

2. A state's statutes and statutory law are not considered binding on the federal courts in an increasing number of cases. See Comment (1928) 37 YALE L. J. 1121. The recent case of Peterson v. Metro. Life Ins. Co., 19 F. (2d) 74 (S. D. Iowa 1926), *aff'd*, 19 F. (2d) 88 (C. C. A. 8th, 1927), seems to go as far as any case, in holding that the federal courts are not bound by a state court's interpretation of any statutes but those of a local nature. See in this connection Ware County v. Nat. Surety Co., 17 F. (2d) 444, 445 (S. D. Ga. 1927).

3. The rule of Gelpcke v. Dubuque, 1 Wall. 175 (U. S. 1864), and its developments in the field of statute law, extend the doctrine where rights accrue before the state's decision. See Rand, *op. cit. supra* note 4. *Cf.* Louisville T. Co. v. Cincinnati, 76 Fed. 296 (C. C. A. 6th, 1896) (validity of mortgage issued under a statute determined by federal court).

[28] DOBIE, *op. cit. supra* note 25, at 572.

[29] It may be unconstitutional. See Hornblower, *op. cit. supra* note 10, at 224. See Field, *dissenting*, in Baltimore & O. R. R. v. Baugh, *supra* note 5, at 401, 13 Sup. Ct. at 927.

[30] See ROSE, FEDERAL JURISDICTION AND PROCEDURE (3d ed. 1926) § 603. For a forceful defense of the doctrine of Swift v. Tyson, as confirming the authority of the federal courts in the interests of uniformity, see Schofield, *Swift v. Tyson: Uniformity of Judge-made State Law in State and Federal Courts* (1910) 4 ILL. L. REV. 533.

[31] It is obvious that while uniformity in federal decisions is served the result is diversity within a state. *Cf. supra* note 10. But it is claimed that the federal decisions will effect a stabilization of an uncertain state rule. See Schofield, *Uniformity of Law as an American Ideal* (1908) 21 HARV. L. REV. 583, 590. A state can still decide as it will, however, notwithstanding the federal decision. *Cf.* McBride v. Farmers' Bank, 26 N. Y. 450, 454 (1863): "We must follow these decisions although they are in conflict with that of the federal court in Swift v. Tyson." It may be argued that the field of diversity will be narrowed as the states adopt uniform statutes, such as the Negotiable Instruments Law. But such statutes would make for uniformity in any case. For a discussion

present enlargement of the scope of the doctrine into other fields than that of strictly commercial, non-statutory law is desirable, its proponents must face the prospect of a single national legal system, which is, to say the least, revolutionary.[32]

Though the existence of any "general law" may perhaps be doubted,[33] it is important to discover, if possible, just what the courts mean by "general" as distinguished from "local" law. There have been many excellent classifications of the cases under one or the other head,[34] but they are of slight utility in determining in a new situation whether the question involved is "general" or "local." [35] One of the leading writers on the subject could dogmatize no better than to say that what is not local is general, and *vice versa*.[36] The categories are obviously *a posteriori*.[37] It must be remembered that there is no compulsion on the federal courts.[38] If they declare themselves bound, even under the scope of section 34 of the Judiciary Act, it is a voluntary bondage, and it is natural that in most instances they so declare themselves only when they are in accord with the state rule.[39]

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of the argument for uniformity, showing how the state courts refuse to adopt an alternative federal ruling, see Frankfurter, *op. cit. supra* note 4, at 528.

[32] *Cf.* Meigs, *op. cit. supra* note 4, 73-75.

[33] See *supra* note 23.

[34] See comprehensive classification, 3 FOSTER, FEDERAL PRACTICE (6th ed. 1921) § 477; see also Comment (1924) 33 YALE L. J. 855.

[35] "No one can possibly tell in advance . . . whether the Supreme Court will adhere in a particular case . . . to the state rule or not." Meigs, *op. cit. supra* note 4, at 67. For example the rule involved in the case under discussion might well be considered both general and local. See *supra* note 16.

[36] *Cf.* in 3 FOSTER, *op. cit. supra* note 34, the statement at 2448 that, "on questions of this nature [commercial law] *except in the case of a local rule of property*, the federal courts are not bound," with that at 2459, that "when decisions establish a rule of property they will be followed, *unless they relate solely to questions of commercial law*." [Italics ours.]

[37] But once put in one or the other category, there being only a single set of courts, the line of decisions on the question is likely to be regular.

[38] *Cf.* Edward Hines Yellow Pine Trustees v. Martin, *supra* note 12, at 463, 45 Sup. Ct. at 545.

[39] "One has always the feeling that the real motive directing the court is the determination to find in some way a reason for deciding the particular case as the chance majority may wish." Meigs, *op. cit. supra* note 4, at 67. In the majority of cases to be sure the problem will not arise, the federal courts following the state rules as a matter of course, having none of their own. For the common law applied by the federal courts can never be a complete system. See DOBIE, *op. cit. supra* note 25, at 577. Moreover they may entirely avoid making the difficult distinction if they are in accord with the state rule. *Cf.* Sim. v. Edenborn, 242 U. S. 131, 37 Sup. Ct. 36 (1916).

The only consistency to be found is in the field of real and personal property, so-called "rules of property" being considered binding on the federal courts as local questions.[40] But even within the field of property there is little certainty due to the fact that questions of "general law" are often involved.[41] And because these property questions have been arbitrarily separated from "general law," they are dealt with by the courts as something apart from the common law.[42] In fact the courts seem to feel that any distinctive local rule is a variant from the common law.[43] In the final analysis when the courts speak of a question as one of "local law," it means either that they think the holding is correct, or that they think it is a variant which they ought to follow. Consequently when they use the term "general law," it may be merely a way of justifying a departure from what they consider an incorrect statement of the law.[44] This theory predicates, as Justice Holmes shows, an ideal common law existing independently of any judicial authority.[45]

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[40] Edward Hines Yellow Pine Trustees v. Martin, *supra* note 12 (question regarding title); Guffey v. Smith, *supra* note 12 (lease); Jones v. Third Nat. Bank, 13 F. (2d) 86 (C. C. A. 8th, 1926) (chattel mortgage). The other "local" rules almost always seem to involve essentially commercial problems. Alabama Consol. Coal & I. Co. v. Baltimore Trust Co., 197 Fed. 347 (D. Md. 1912) (powers and liabilities of corporations); Union Trust Co. v. Grosman, 245 U. S. 412, 38 Sup. Ct. 147 (1918) (power of married woman to contract); Amer. Surety Co. v. Bellingham Nat. Bank, 254 Fed. 54 (C. C. A. 9th, 1918) (suretyship); Ohio v. Frank, 103 U. S. 697 (1880) (interest rates). Local public policy as a criterion of a local rule is no more certain. See Hartford Fire Ins. Co. v. Chicago M. & St. P. R. R., *supra* note 16, at 100, 20 Sup. Ct. at 37.

[41] See cases cited in Kuhn v. Fairmont Coal Co., *supra* note 5, at 361-364, 30 Sup. Ct. at 144-145.

[42] See Baltimore & O. R. R. v. Baugh, *supra* note 5, at 378, 13 Sup. Ct. at 918: "The question is one of general law . . . There is in it no rule of property, but it rests upon . . . the common law." See also Chicago v. Robbins, 2 Black. 418, 428 (U. S. 1862). To distinguish between rules of property and the common law seems unwarranted; in evolving the rule of property, the state courts certainly claim in most cases to be applying the common law.

[43] See Yates v. Milwaukee, 10 Wall. 497, 506 (U. S. 1870). The question of the dedication of a wharf to public use is said there not to "depend upon state statute or local state law. The law which governs the case is the common law, on which this court has never acknowledged the right of the state courts to control our decisions, except . . . where the state courts have established, by repeated decisions, a rule of property." This distinction likewise seems unwarranted.

[44] In many cases, of course, the term "general law" will be applied and the state ruling will still be followed, as the correct one. Salem Co. v. Manufacturers' Finance Co., *supra* note 5.

[45] Von Moschzisker recognizes this and argues therefrom for a federal common law. Von Moschzisker, *op. cit. supra* note 18. But it would seem to be more than that. *Cf.* note 26 *supra*.

But it is hard to reconcile with this theory, based as it is on the desire for uniformity, the fact that, under the Judiciary Act, state statutes, and their construction by the state courts, are followed irrespective of how they differ from that ideal common law.[46] If a state rule on a matter of commercial law is evolved by the state's judiciary it is called "general" in the federal courts, but if it is evolved by the legislature and put on the statute books it is "local." [47]

The doctrine of *Swift v. Tyson* is at best a rough formula to help in the difficult task of adapting a federal judicial system to a union of sovereign states.[48] The solution of the difficulty seems to lie in the principle of comity.[49] The federal courts have long recognized this,[50] and where doubt existed,[51] or there were no previous decisions in the federal courts,[52] have followed the state courts as "persuasive" authority,[53] even where claiming the right of exercising an independent judgment.[54] An extension of this practice into such cases as the present, where

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[46] *Cf.* Holmes' dissent in this connection.

[47] "The meaning of statutes of a state" is a question "of local law." Edward Hines Yellow Pine Trustees v. Martin, *supra* note 12, at 462, 45 Sup. Ct. at 545.

[48] See DOBIE, *op. cit. supra* note 25, § 1. "Concurrence of jurisdiction" is a difficult working theory.

[49] Comity in fact seems fully as important as the Judiciary Act in leading a federal court to follow a state decision. Assuming that the usual interpretation of the act is correct and that the word "laws" refers to statutes only, in the field of non-statutory "local" law the binding effect of state decisions must depend wholly on comity. In Bucher v. Cheshire R. R., 125 U. S. 555, 8 Sup. Ct. 974 (1888), compare the statement at 583, that "rules of property . . . are to be treated as laws of the state by the federal courts," referring apparently to "laws" in the Act, with the statement at 584, that "decisions of the state courts that relate to some law of a local character . . . are *usually* conclusive and always entitled to the highest respect of the federal courts." [Italics ours.] It has even been suggested that the following of a state's statutory law by a federal court is a matter of comity. See Hornblower, *op. cit. supra* note 10, 212-220.

[50] Occasionally a court will wait till the state court has announced its local rule in a pending suit. Hartford Fire Ins. Co. v. Chicago M. & St. P. R. R., 62 Fed. 904 (C. C. N. D. Iowa 1894), *aff'd*, 175 U. S. 91, 20 Sup. Ct. 33 (1899). Or it may even reverse itself after the rule has been announced. Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. 466 (1893) (interpretation of statute of limitations).

[51] Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10 (1883).

[52] Community Bldg. Co. v. Maryland Casualty Co., 8 F. (2d) 678 (C. C. A. 9th, 1926).

[53] *Ibid.*

[54] After the Supreme Court in Kuhn v. Fairmont Coal Co., *supra* note 5, with much difficulty came to the conclusion that a decision of the state court on the question in hand was not binding, the Circuit Court of Appeals, on the return of the case, followed the state decision. 179 Fed. 191 (C. C. A. 4th, 1910).

the argument for a uniform commercial law seems not to apply, even though the question may be one which has previously been called one of "general law," would be welcomed.[55]

EFFECT OF IRREGULARITIES IN AUTHORITY OF CORPORATE OFFICIAL TO BORROW MONEY

Even the most common loan transaction between a bank and a corporate borrower presents many interesting questions in agency law. Assuming that the bank is satisfied with the borrower's credit, and is willing to make the loan, what showing of authority must it demand as to the power of the corporate officer to sign the instrument evidencing the company's obligation? Is there any standard of what constitutes a sufficient paper showing in this respect which, if relied upon by the bank, will afford it protection even though the officer had no express authority?

The problem involves two conflicting interests. On the one hand, a corporation should not be bound if, as a matter of fact, it has not given the official proper authority. On the other hand, dealings in corporate paper would be seriously hampered if, before a bank could be certain of the obligation of a corporation, it would have to ascertain that there were no defects whatsoever in the chain of authority.[1] Thus, before relying on a resolution of the board of directors giving the official the requisite authority, it would be necessary to determine whether there had been a meeting of the board, whether it had been validly called, whether the proper notice had been given each director, and whether the resolution was properly passed and properly recorded. Obviously, there must be certain situations in which a company is responsible for the acts of an official, even though there are defects in his grant of authority. Or, in other words, there must be some situations where an officer may have power to bind the company without express authority.[2]

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[55] It has been suggested that Congress might well re-enact Section 34 of the Judiciary Act to cover decisions of state courts explicitly. See (1924) 33 YALE L. J. 855, 859. In Baltimore & O. R. R. v. Baugh *supra* note 5 at 372, 13 Sup. Ct. at 915, one of the court's reasons for following the Swift v. Tyson doctrine, was that Congress had never altered the Judiciary Act after that case had so construed it.

[1] It is perhaps better to hold banks to a higher degree of inquiry than ordinary persons. This suggestion is made in Isaacs, *Business Postulates and the Law* (1928) 41 HARV. L. REV. 1014, 1028, where it is pointed out that a bank can and generally does demand evidence of authority when dealing with a corporation.

[2] In this discussion, "authority" is used primarily in the sense of "an oral or written communication from the principal to the agent, expressing an actual intention that the agent shall act on the principal's behalf in

Two of these situations are fairly clear. The first arises where a prior course of dealing by the official, of which both the bank and the company have knowledge, justifies the inference that he has been given authority.[3] This may exist where the bank has previously taken notes from the official, and the company has recognized the validity of the obligation;[4] or where it has been a custom for officials occupying that particular position to do the act in question, and the bank is aware of the custom;[5] or where the bank knows that the official has the authority to do certain acts, from which authority to perform the act in question is clearly implied.[6] In these cases, many courts will find that the official has the power to bind the company, although only as to those persons who are acquainted with this appearance of authority—an appearance fostered by the company. That the official has not actually been given the authority, or even that the by-laws prohibit a grant of authority to him, is not sufficient to excuse the company from responsibility under such circumstances.[7]

The designation of an official as president, secretary, treasurer, or the like, does not of itself justify a bank in assuming that he has authority. Such an official is generally held to lack the power to bind a corporation by dealings with regard to negotiable paper and similar instruments.[8]

A bank is also accorded protection when the money received on the instrument goes to the benefit of the corporation. Many

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one or more transactions with third persons." Corbin, *The Authority of an Agent—Definition* (1925) 34 YALE L. J. 788. If the result is that the act of the agent binds his principal, we shall say that he has the power to do so. "Authority" is considered as descriptive of the operative facts out of which the legal relation of power arises.

[3] "Apparent authority." See MECHEM, AGENCY (2d ed. 1914) § 720.

[4] Foster v. Ohio-Colorado Mining Co., 17 Fed. 130 (D. Colo. 1883); Produce Exch. Trust v. Bieberbach, 176 Mass. 577, 58 N. E. 162 (1900); Shawhan v. Shawhan Distilling Co., 195 Mo. App. 492, 197 S. W. 371 (1917).

[5] Madeiran Alliance v. Lowell Trust Co., 237 Mass. 89, 129 N. E. 440 (1921) (no recovery allowed against bank, where it paid checks signed by a new treasurer, after a prior course of dealing with the former occupant of the office, in which course the company had acquiesced).

[6] Judell Co. v. Goldfield Realty Co., 32 Nev. 351, 108 Pac. 455 (1910); McKinley v. Mineral Hill Consol. Min. Co., 46 Wash. 162, 89 Pac. 495 (1907).

[7] FLETCHER, CYC. CORP. (1917) § 1931, and SUPP. (1924) § 1931.

[8] For president, see FLETCHER, CYC. CORP. (1917) § 2037; THOMPSON, CORPORATIONS (3d ed. 1927) §§ 1586, 1588, 1589; Note (1915) 63 U. OF PA. L. REV. 684. For vice-president, FLETCHER, *op. cit. supra* § 2006; THOMPSON, *op. cit. supra* § 1619. For secretary, FLETCHER, *op. cit. supra* § 2076; THOMPSON, *op. cit. supra* § 1635. For treasurer, FLETCHER, *op. cit. supra* §2089, THOMPSON, *op. cit. supra* § 1679. For general manager, FLETCHER, *op. cit. supra* § 2111; THOMPSON, *op. cit. supra* § 1702.

courts regard the acceptance of the benefit as a ratification of the authority.[9] A more generally applied remedy is an action in quasi-contract for the actual benefit received but not for the stated amount of the obligation.[10] The courts often deny such a recovery by a narrow construction of "benefit." It has been held that a company has received no benefit and so is not responsible if the money merely went to replace company money that an official had fraudulently converted to his own use.[11] Crediting money to the corporate bank account is not a benefit where an official immediately thereafter fraudulently withdraws and misappropriates it.[12] This indefinite concept of "benefit" makes it extremely difficult for banks to predict whether or not the corporation will be held responsible on that theory. Furthermore, a recovery in quasi-contract would not include interest, which is generally the entire consideration for the loan.

In the absence of facts on which to predicate the above actions, there may be the situation, in which an individual, unknown to the bank, seeks to borrow money in the name of a corporation, the by-laws of which provide for a grant of the requisite authority, by resolution, to an official. The individual alleges that he is such an official.[13] What documentary evidence of authority will protect the bank in granting the loan? Where there is involved the authority to sign contracts of indemnity or guarantee bonds, to sign or assign mortgages, or accept or indorse bills of exchange, the problem is substantially the same. The English courts appear to have evolved a rule for this situation. In 1856, the Exchequer Chamber, in the case of *Royal British Bank v. Turquand*,[14] held that a company, whose deed

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[9] Stiewel v. Webb Press Co., 79 Ark. 45, 94 S. W. 915 (1906); La Normandie Hotel Co. v. Security Trust Co., 38 App. D. C. 187 (1912); Galveston R. R. v. Cowdrey, 11 Wall. 459 (U. S. 1870); *cf.* Hutchinson v. Rock Hill Real Estate & Loan, 65 S. C. 45, 43 S. E. 295 (1902).

[10] Fitzgerald & Mallory Construction Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. 36 (1890); Underwood v. Bank of Liverpool, [1924] 1 K. B. 775; Blackburn Bldg. Society v. Cunliffe Brooks & Co., 22 Ch. Div. 61 (1882); FLETCHER, *op. cit. supra* note 8, § 1455; *cf.* Industrial Sav. Bank v. People's Fun. Service, 296 Fed. 1006 (Ct. of App. D. C. 1924).

[11] Merchants Nat. Bank v. Nichols & Shephard, 223 Ill. 41, 79 N. E. 38 (1906).

[12] Fay v. Slaughter, 194 Ill. 157, 62 N. E. 592 (1902).

[13] In all of these situations it is assumed that the company had the authority to do the act involved. Questions of ultra vires are not considered.

This situation is peculiarly apt to arise under the prevalent practice of satisfying demands for evidence of authority by furnishing what purport to be proper resolutions of the directors, although, in fact, the directors have taken no action. See Susquehanna Line v. Auditors, *infra* note 36; Aetna Casualty & Surety v. American Brewing Co., *infra* note 40.

[14] 6 E. & B. 327 (1856).

of settlement allowed the directors to borrow on bond such money as might be authorized by a resolution of a general meeting of the company was responsible on a bond issued by the directors even though no such resolution had been passed. The court ruled that where authority (under the by-laws, charter, or by statute) may be given by a resolution, third parties may rely on an instrument which appears on its face to be such a resolution.[15] Or, as it has been restated by courts and authorities, a third party is not held to notice of "internal irregularities" not readily apparent to him in the granting of the authority.[16] If the officer in charge of the minutes certifies a copy of what is supposed to be a resolution, the bank may rely on its authenticity, and the company is bound even though the resolution was never properly passed. The House of Lords followed the rule some years later in holding that a corporation was responsible on checks signed by two officials where its secretary had falsely written the bank that the board had passed a resolution authorizing them to sign.[17] A later decision held that a mortgage was a valid obligation of a company when signed by two directors, although the board of directors, under a by-law giving them power to fix the number of signatures required, had passed a secret resolution making three the number.[18]

In three recent English cases, the rule of the *Turquand* case, as developed by the subsequent decisions, was recognized as law, but each court excused the company from responsibility on some other ground. In *Kreditbank Cassel v. Schenkers*,[19] the Court of Appeal held that a company was not responsible on bills forged in its name by a branch manager, even though under the by-laws he could have been authorized to draw such bills.

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[15] "Parties dealing with limited companies are bound to read the statute and deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement would find, not a prohibition against borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have the right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done." Jervis, C. J., *ibid.* 332.

[16] The rule has been stated by several authorities, but little effort has been made to collect the kinds of cases falling within it. See MECHEM, *op. cit. supra* note 3, § 762; THOMPSON, *op. cit. supra* note 8, § 1799. The most extensive discussion is that found in MORAWETZ, PRIVATE CORPORATIONS (2d ed. 1886) § 610.

[17] Mahony v. E. Holyford Mining Co., L. R. 7 H. L. 869 (1875). There was also some question as to whether the secretary who presented the resolution had been validly elected.

[18] County of Gloucester Bank v. Rudry Merthyr Steam, [1895] 1 Ch. 629.

[19] [1927] 1 K. B. 826.

It was held that the *Turquand* rule did not apply to the case of forgeries.[20] In *Houghton & Co. v. Nothard, Lowe & Willis*,[21] the same court held that the mere fact that a director could be given authority to make an agreement under the by-laws did not necessarily make the company responsible, under the rule of the *Turquand* and subsequent cases. The fact that the party dealing with the corporation was shown not to have relied on the by-law was regarded as controlling. In the most recent case, *Liggett, Ltd. v. Barclays Bank*,[22] a bank paid checks signed by an alleged director, after the president of the company had notified the bank that this so-called director had been elected to that office. The transaction appeared, on its face, to be in accord with the by-laws, but actually there had been no valid election. Wright, J., held that in the absence of notice, the bank was justified in presuming, under the rule of the *Turquand* case, that the proper steps in the internal management necessary to the election of a director had been followed. But as the jury had found that the bank had notice of the defect, he sent the case to a referee to determine how much of the money had gone to the benefit of the company, the element of notice having defeated recovery of the whole sum.[23] These cases would indicate that the rule of the *Turquand* case is still the law in England, in spite of a tendency to limit it in particular instances.

The American rule is less certain. Two years after the *Turquand* decision, the United States Supreme Court, in a suit on county bonds, cited and followed the rule of that case as to internal irregularities. The Court held that from the issuance of the bonds by the county commissioners, a purchaser could presume that the vote of a certain proportion of citizens, required by the statutes as a prequisite to issuance, had been secured.[24]

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[20] In doing so, the court followed Ruben v. Great Fingall Consol., [1906] A. C. 439 (company not responsible on certificates of stock forged by secretary, and pledged to secure his own debt), and held that the rule of Mahony v. E. Holyford, *supra* note 17, did not apply to forgeries.

[21] [1927] 1 K. B. 246, *aff'd*, House of Lords, 97 L. J. K. B. 76 (1927). In the opinions of the House of Lords, no mention was made of the Turquand case. The opinions there were based on the ground that the third person had notice of the lack of authority. The decision of the Court of Appeal is noted in (1927) 40 HARV. L. REV. 1010.

[22] [1928] 1 K. B. 48.

[23] The eagerness of Wright, J., to get the case out of the Turquand rule may perhaps be explained by the fact that he was the trial judge in both the Kreditbank and Houghton cases. His decisions therein, based entirely on the rule of the Turquand case, were both reversed by the Court of Appeal, and the reversal in the Houghton case was sustained in the House of Lords.

[24] County of Knox v. Aspinwall, 21 How. 539 (U. S. 1858). In later decisions the Supreme Court changed the reason for making such a finding, considering that it should be based on the ground that the decision of the

The Supreme Court, in 1898, followed this rule, holding a railroad corporation responsible on a contract of guaranty, even though the board of directors had authorized the execution of the contract without a petition from a majority of the stockholders, as required by statute.[25] Banks purchasing bonds in reliance on the resolution of the board of directors authorizing the guaranty contract were held to be justified in presuming from the resolution that the necessary petition had been presented.[26] This decision was followed in a more recent case in a lower federal court, purchasers of guaranty bonds being protected even though the board of directors of the company had issued them without first securing a unanimous vote of the stockholders, as required by statute.[27] And on facts similar to these, the rule of the *Turquand* case had been followed years before in a state court where the company was held responsible to a purchaser.[28]

Where the person dealing with an official, however, sees no resolution or purported resolution of the board of directors, but relies merely on the fact that an official may be so authorized under the by-laws, two federal courts have held the company not responsible. Where a president could have been given power to execute a note, but was not, a corporation was not responsible on notes executed by him, there being no evidence of authority except the inference arising from his acts.[29] The court indicated that if the board of trustees had authorized the president to execute a note, the company would have been held, even

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commissioners as to the validity of an election was binding, instead of on the Turquand rule. For a discussion of this change, see MORAWETZ, *op. cit. supra* note 16, §§ 612, 613. For the later view, see Quinlan v. Green County, 205 U. S. 410, 27 Sup. Ct. 505 (1907).

[25] Louisville, N. A. & C. Ry. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. 817 (1898).

[26] The court said, "One who takes from a corporation in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by the board of directors, . . . disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could, by any action of its officers or stockholders or of both, have authorized the execution and issue of the obligation."

[27] Gay v. Hudson River Electric Power Co., 190 Fed. 773 (N. D. N. Y. 1911). The court said, "It would be intolerable to hold that the ultimate purchaser of a negotiable bond offered on the market and guaranteed by another corporation is bound to go to the record of the corporation executing the guaranty and ascertain at his peril that the requisite authority has been given at a duly called meeting of its stockholders."

[28] Connecticut Mutual Life Ins. Co. v. C., C. & C. R. R., 41 Barb. 9 (N. Y. 1863).

[29] St. Vincent College v. Hallett, 201 Fed. 471 (C. C. A. 7th, 1912). Humphrey, J., dissented on the ground that the failure to provide the authorization was an internal irregularity, of which third parties were not bound to take notice under the Louisville Trust case, *supra* note 25.

though the necessary authorization from the stockholders had not been secured. In a similar case involving the execution of a mortgage by a president, the company was likewise excused from responsibility, the court stating that the rule of the *Turquand* case did not apply.[30] In this connection, it is to be noted that a recital in the instrument, by an official, to the effect that he has been given the necessary authority, has been held not to bind the company.[31]

The rule of the *Turquand* case was recently relied on in a federal court to hold a company responsible on a mortgage which was purchased in reliance on a resolution of the board of directors, even though the meeting at which the resolution was adopted was illegal because of the absence of one director.[32] State courts have likewise refused to excuse a company from responsibility because of a latent defect rendering the meeting of the board invalid, where a person acted in reliance on a resolution apparently valid on its face.[33]

Decisions in the state courts are not numerous. Where by the terms of its charter, a corporation was forbidden to borrow any more than two-thirds of the amount of capital paid in, it was held responsible on a mortgage given as security on bonds issued,

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[30] Maryland Finance Corporation v. Duvall, 284 Fed. 764 (C. C. A. 4th, 1922). With these cases *cf.* Kreditbank Cassel v. Schenkers, *supra* note 19.

[31] American Savings & Loan v. Smith, 122 Ala. 502, 27 So. 919 (1899). But *cf.* Grant County State Bk. v. Northwestern Land Co., 28 N. D. 479, 150 N. W. 736 (1915), which would indicate that a third party could rely on the statement if the officer was the one from whom inquiry as to the granting of authority would have to be made. Compare also the rule that an agent cannot establish his authority by his own representations.

[32] Lowenstein & Sons v. British-Am. Mfg. Co., 300 Fed. 853 (D. Conn. 1924).

[33] Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594 (1898) (evidence inadmissible to show that meeting was held in wrong place, and no notice given); Sferlazzo v. Oliphant, 24 Cal. App. 81, 140 Pac. 289 (1914) (two directors absent—presumption of validity from resolution itself held sufficient to defeat nonsuit on note); *cf.* Hutchinson v. Rock Hill Real Estate & Loan, 65 S. C. 45, 43 S. E. 295 (1902); Hartley v. Ault Woodenware Co., 82 W. Va. 780, 97 S. E. 137 (1918). In each case, a company was held responsible for obligations incurred by officers from persons relying on forged resolutions of the board of directors, that is, on certified copies of resolutions that actually were never passed. However, in each case there was some evidence that the benefit went partly, at least, to the company, and this factor had considerable effect on the courts.

Cf., also, Baker v. Marvel Creek Mining Co., 5 Alaska 348 (1915) (mortgage given by three directors held valid, though other two were not notified. The company received an indirect benefit, but the court seemed to feel that the purchaser would nevertheless be justified in relying on the validity of the mortgage).

although the amount borrowed was in excess of the prescribed amount.[34] The court cited the *Turquand* rule to sustain its view that third persons could rely on the fact that the condition had been complied with, from the issuance of the bonds by those officers who alone knew whether or not the condition had been met.[35] In another case, the secretary of a company fraudulently altered a valid resolution so as to give him the power to assign mortgages. The company was held responsible on a mortgage so assigned despite the fraud.[36] But a mortgage authorized by resolution of the board of directors has been held invalid where the meeting was not held in the state, as required by statute.[37] The same decision obtained where a meeting was invalid because of the lack of proper notice to one director.[38]

There is little authority in this country as to the form the resolution must be in in order to enable a bank to rely on its validity. It has been held that a person must see the resolution or a written copy of it, and cannot rely on the statement of the secretary that one was passed.[39] One court has held that the resolution must be valid on its face, that is, must contain nothing which shows that the meeting at which the resolution was passed was invalid.[40] Another court has held that the

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[34] Hackensack Water Co. v. DeKay, 36 N. J. Eq. 548 (1883).

[35] The court said, "Persons dealing externally with those managing the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, are not to be affected by any irregularities which take place in the internal management of the company. They are entitled to presume that that of which only they can have knowledge, namely, the external acts, is rightfully done, when those external acts purport to be performed in the mode in which they ought to be performed." *Ibid.* 565.

[36] Commonwealth v. Reading Savings Bank, 137 Mass. 431 (1884); *cf.*, also, Whiting v. Wellington, 10 Fed. 810 (D. Mass. 1882); Holden v. Phelps, 141 Mass. 456, 5 N. E. 815 (1886); Holden v. Whiting, 29 Fed. 881 (D. Mass. 1887), all based on the same facts involved in the Reading Bank case, and all reaching the same result as far as the responsibility of the company is concerned. *Cf.* Susquehanna Line v. Auditore, 229 N. Y. Supp. 181 (App. Div. 2d Dept. 1928), where a bank cashed a check signed by a director payable to himself, in reliance on a purported resolution signed by the secretary and vice-president that such checks should be honored. The resolution had been altered from the form as originally passed. The court held that the wording of the resolution plus notice of a suit to restrain the transfer of the money should have put the bank on inquiry.

[37] State Nat. Bank v. Union Nat. Bank, 168 Ill. 519, 48 N. E. 82 (1897).

[38] Bank of Little Rock v. McCarthy, 55 Ark. 473, 18 S. W. 759 (1892).

[39] Franklin v. Havalena Mining Co., 18 Ariz. 201, 157 Pac. 986 (1916) (secretary stated that board of directors had authorized him to execute lease, though no such resolution had been passed. He had forged one on the minute books, but the plaintiff did not see the books).

[40] Aetna Casualty & Surety Co. v. Am. Brewing Co., 63 Mont. 474, 208

persons who sign the copy of the resolution, must in fact have been officers at its date.[41] In this connection, it should be noted that the courts tend to construe resolutions dealing with the authority to handle negotiable instruments strictly in favor of the principal, which in this case is the corporation.[42]

All that can be said of the decisions is that in a few isolated fact situations, the rule of the *Turquand* case has been followed. The tendency seems to be to decide each case on its own merits. It would certainly promote business convenience, and facilitate commercial transactions, if a bank dealing with a corporate officer knew that if it secured certain instruments from certain officials it could feel safe in the knowledge that it had the obligation of the corporation, even though there were some defect in the authorization of the officials. On the other hand, to hold a corporation responsible to a bank which relies on what appears to be a valid resolution of the board of directors, signed by its secretary, might appreciably increase the use of spurious resolutions by its officers. Such, however, does not appear to have been the result of the rule as applied in England.

THE CONSTITUTIONALITY OF THE PROPOSED FEDERAL DECLARATORY JUDGMENT ACT

In the recent case of *Willing v. Chicago Auditorium Ass'n*, 48 Sup. Ct. 507 (U. S. 1928), the Supreme Court has strengthened the inference drawn from the opinion in the first *Liberty Warehouse* case,[1] that an attempt by Congress to authorize the federal courts to render declaratory judgments might be held unconstitutional, for the Supreme Court has suggested three times, in dicta,[2] that actions for declaratory judgments do not constitute "cases" or "controversies" within the meaning of Article 3 of the Federal Constitution relating to the exercise of the judicial power.[3]

Pac. 921 (1922) (resolution stated that meeting was called by directors, but by-laws required that president must call all meetings).

[41] Northville State Bank v. Detroit Silver Refining Co., 181 Mich. 515, 148 N. W. 175 (1914) (resolution signed by person not president at its date is not admissible in evidence).

[42] MECHEM, *op. cit. supra* note 3, § 969.

[1] Liberty Warehouse Co. v. Grannis, 273 U. S. 70, 47 Sup. Ct. 282 (1927); Comment (1927) 36 YALE L. J. 845.

[2] See Willing v. Chicago Auditorium Ass'n, 48 Sup. Ct. 507, 509 (U. S. 1928); Liberty Warehouse Co. v. Burley Tobacco Growers Ass'n, 276 U. S. 71, 89, 48 Sup. Ct. 291, 294 (1928); Liberty Warehouse Co. v. Grannis, *supra* note 1, at 74, 47 Sup. Ct. at 283.

[3] "The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies . . . between citizens of different states . . . " U. S. CONST., Art. 3, § 2.

In the many jurisdictions which have adopted the declaratory judgment [4] the *Auditorium* suit would be regarded as a proper case for its application.[5] Lessees of land for a long term erected a building thereon, and when it became inadequate for their needs, proposed to demolish it and erect a new structure. The landlord disputed the tenants' privilege to so rebuild, and thereby imposed an insuperable obstacle to the undertaking. The tenants brought an action to remove what they alleged to be a cloud on their title. The District Court dismissed the bill.[6] That decree was reversed in the Circuit Court of Appeals [7] on the ground that the doubt created by the landlord's position with respect to the construction of the lease constituted a removable cloud.[8] On certiorari to the Supreme Court the decree of the Circuit Court was reversed on the ground that, there being no removable cloud, this was in effect a suit for a declaratory judgment. Although the court might have based its decision on the absence of authority from Congress to render declaratory judgments, it chose to repeat the broader dictum referred to above,[9]—a dictum clothed with importance in view of the pending Federal Declaratory Judgment Act which passed the House on January 25, 1928.[10]

Certain authorities [11] are cited by the Court to show that resort to equity to remove such doubts is a proceeding which was unknown to either English or American courts at the time of the adoption of the Constitution and for more than half a

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This section defines the scope of the judicial power. See Chisholm v. Georgia, 2 Dall. 419, 475 (U. S. 1793).

[4] For a discussion of the declaratory judgment in England and other countries see Borchard, *The Declaratory Judgment—A Needed Procedural Reform* (1918) 28 YALE L. J. 1. For a list of the jurisdictions in the United States which have adopted the action by statute see Comment (1926) 35 YALE L. J. 473. The number is now twenty-three.

[5] For similar cases involving the construction of leases see Young v. Ashley Gardens, Ltd., [1903] 2 Ch. 112; Girard Tr. Co. v. Tremblay Motor Co., 291 Pa. 507, 140 Atl. 506 (1928); Sarner v. Kantor, 123 Misc. 469, 205 N. Y. Supp. 760 (Sup. Ct. 1924).

[6] Chicago Auditorium Ass'n v. Cramer, 8 F. (2d) 998 (D. Ill. 1925).

[7] Chicago Auditorium Ass'n v. Willing, 20 F. (2d) 837 (C. C. A. 7th, 1927).

[8] Notes (1928) 13 CORN. L. Q. 109; (1928) 26 MICH. L. REV. 426; (1927) 41 HARV. L. REV. 104; (1927) 76 U. OF PA. L. REV. 217.

[9] "But still the proceeding is not a case or controversy within the meaning of Article 3 of the Constitution." Willing v. Chicago Auditorium Ass'n, *supra* note 2.

[10] Bill H. R. n. 5623 (70th Congress, 1st Session). It would authorize the federal courts to render declaratory judgments "in cases of actual controversy."

[11] See Cross v. DeValle, 1 Wall. 1, 14 (U. S. 1863); Jackson v. Turnley, 1 Drew. 617, 627 (1853); Rooke v. Lord Kensington, 2 K. & J. 753, 760 (1856); Lady Langdale v. Briggs, 8 DeG., M. & G. 391, 427 (1856).

century thereafter. Two of these cases dealt with future rights and are not applicable.[12] The other two refused to declare present rights where no consequential relief could be given, for such was never the practice, as was said in *Jackson v. Turnley*.[13] But there is a distinction between the practice [14] of the court and the jurisdiction of the court.[15] It is admitted that before the "1883 Rules of Court" [16] the equity courts did not make such declarations, but this practice does not prove that there was no jurisdiction to do so. This distinction was drawn by the English Court of Appeal in *Guaranty Trust Co. v. Hannay*,[17] when it held that Order XXV, Rule 5,[18] giving the Court power to make declaratory judgments, did not extend its jurisdiction. As Bankes, L. J., said:

"It was in this latter sense [the loose sense of 'no jurisdiction' —where the court has power, but does not choose, to entertain some matter in dispute on the ground that it is not matter proper or convenient for it to adjudicate upon] I think that the Vice Chancellor was speaking in the case of *Rooke v. Lord Kensington*, when he says that there was no jurisdiction in the Court of Chancery before the Chancery Procedure Act, 1852, to make a simple declaration of right where no consequential relief was claimed. I cannot doubt that, had the Court of Chancery of those days thought it expedient to make mere declaratory judgments they would have claimed and exercised the right to do so." [19]

Such is the construction placed by the English Court of Appeal upon a case relied upon in the *Auditorium* case to support a dictum to the opposite effect. Unless matters of practice and

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[12] Cross v. DeValle, and Lady Langdale v. Briggs, *supra* note 11.

[13] *Supra* note 11, at 626. Having determined that such was not the practice before the Chancery Procedure Act of 1852, the court then construed the act as authorizing declaratory judgments only in cases where consequential relief could be awarded. The pertinent portion of the act provides that "it shall be lawful for the Court to make binding declarations of right, without granting consequential relief." (1852) 15 & 16 Vict. c. 86.

[14] 1 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) 153. Equity jurisdiction, in the strict sense, is here defined as "the power residing in such court to determine judicially a given action, controversy, or question presented to it for decision." From this is distinguished another use of the term referring to "the power to hear certain kinds and classes of civil cases according to the *principles* of the method and procedure adopted by the court of chancery . . . ." *Ibid.* 156.

[15] Article 3 of the Federal Constitution deals with jurisdiction in the strict sense. See note 14 *supra*.

[16] Rules of the Supreme Court, 1883.

[17] [1915] 2 K. B. 536.

[18] *Supra* note 16.

[19] Guaranty Trust Co. v. Hannay, *supra* note 17, at 568.

procedure[20] are to be confused with jurisdiction, the soundness of the dictum in the *Auditorium* case should be gauged exclusively by the scope of the jurisdiction of the Court—that is to say, the scope of the terms "case" and "controversy."[21]

The legislature may, by providing an appropriate form of proceeding, extend the power of the court to any class of cases involving a controversy between citizens of different states.[22] Hence it would seem that the constitutionality of the declaratory judgment in the federal courts depends upon whether those well defined classes of situations regarded as suitable for declaratory adjudication[23] present controversies.

What, then, are the elements of a controversy? In the course of our judicial history certain tests have been laid down. First, the dispute must be such that a judgment rendered will be conclusive and binding.[24] Second, there must be a specific,[25] live[26] issue between adverse parties.[27] And third, this issue must involve substantial legal interests.[28]

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[20] The use in Article 3 of the Constitution of the word "controversies" in contradistinction to the word "cases," and the omission of the word "all" in respect to controversies, left it to Congress to define the controversies over which the courts it was empowered to create and establish might exercise jurisdiction, and the manner in which this was to be done. Stevenson v. Fain, 195 U. S. 165, 25 Sup. Ct. 6 (1904). Thus, Congress possesses the sole right to say what shall be the forms of proceeding in the courts of the United States. Ex Parte New Orleans City Bank, 3 How. 292 (U. S. 1845); Livingston v. Story, 9 Pet. 632 (U. S. 1835).

[21] An act of Congress cannot extend the jurisdiction of the federal courts beyond the limits defined by the Constitution. Dred Scott v. Sandford, 19 How. 393 (U. S. 1857); Hodgson v. Bowerbank, 5 Cranch 303 (U. S. 1809).

[22] Gaines v. Fuentes, 92 U. S. 10 (1875); Ry. Co. v. Whitton, 13 Wall. 270 (U. S. 1871).

[23] For a collection of various types of declaratory judgment cases see Borchard, *op. cit. supra* note 4, at 105.

[24] Gordon v. United States, 117 U. S. 697 (1864).

[25] New Jersey v. Sargent, 269 U. S. 328, 46 Sup. Ct. 122 (1926).

[26] The jurisdiction does not extend to imaginary issues framed for the purpose of involving the advice of the court without real parties or a real case. Muskrat v. United States, 219 U. S. 346, 31 Sup. Ct. 250 (1911); Keller v. Potomac Electric Power Co., 261 U. S. 428, 43 Sup. Ct. 445 (1923). Nor does it extend to moot cases. United States v. Hamburg American Line, 239 U. S. 466, 36 Sup. Ct. 212 (1915); Director of Prisons v. Court of First Instance, 239 U. S. 633, 36 Sup. Ct. 220 (1915).

[27] South Spring Gold Mining Co. v. Amador Medean Gold Mining Co., 145 U. S. 300, 12 Sup. Ct. 921 (1892); Filer v. Levy, 17 Fed. 609 (C. C. La. 1883). The requirement is not met by a suit ancillary to a judgment or pending suit in a state court.

[28] This excludes purely political questions. Massachusetts v. Mellon, 262 U. S. 447, 43 Sup. Ct. 597 (1923). And cases where the interest of the plaintiff is too minute or uncertain. Stearns v. Woods, 236 U. S.

Although all of these elements were present in the *Auditorium* case,[29] the court insisted that, until the defendant has either injured the plaintiff or shown himself to be on the verge of doing so no judicable controversy exists.[30] It is not clear whether the Court held this essential to the maintenance of the suit by reason of the lack of a statute authorizing the declaratory action, or by reason of Article 3. But the caveat of Justice Stone in his concurring opinion,[31] read in connection with certain portions of the majority opinion, compels the belief that, although unnecessary to the disposition of the case,[32] the latter was intended.

To be sure, the plaintiff who seeks consequential relief must show his injury, and he who seeks the injunction must show a threat. But there are other modes of relief applicable in the absence of such injury or threat.[33] The jurisdiction to relieve owners of real property from vexatious claims or even the grounds for possible future claims is inherent in equity.[34] Justice Field has pointed out that in actions to quiet title it was not necessary that such title should have been controverted or assailed.[35] For the very *raison d'etre* of such actions has always been to protect the property owner from depreciation in value due to the existence of adverse claims not then being presented in such manner as to furnish ground for an action at law.[36] Such conditions to the exercise of this jurisdiction as have from time to time been prescribed by the courts[37] may be dispensed with by the legislatures without thereby enlarging the jurisdiction of equity.[38] Thus the action for the construction of a

75, 35 Sup. Ct. 229 (1915); Frothingham v. Mellon, 262 U. S. 447, 43 Sup. Ct. 597 (1923); *cf.* Roberts v. Bradfield, 12 App. D. C. 453 (1898).

[29] *Supra* note 2.

[30] *Ibid.*

[31] "I concur in the result. But it is unnecessary, and I therefore am not prepared, to go further and say anything in support of the view that Congress may not constitutionally confer on the federal courts jurisdiction to render declaratory judgments . . . ." *ibid.*

[32] See Grinnell, *The Anticipatory Declaratory Opinion of the Supreme Court of the United States that the Rendering of Declaratory Judgments Was Not Within The Constitutional Jurisdiction of That Court* (1928) 13 MASS. L. Q. 43.

[33] 4 POMEROY, *op. cit. supra* note 14, at 3303.

[34] Sharon v. Tucker, 144 U. S. 533, 12 Sup. Ct. 720 (1892); Howard, *Bills to Remove Cloud From Title* (1918) 25 W. VA. L. Q. 109.

[35] Sharon v. Tucker, *supra* note 34, at 543, 12 Sup. Ct. at 722; Fidelity Nat. Bank v. Swope, 274 U. S. 123, 47 Sup. Ct. 511 (1927).

[36] Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495 (1884).

[37] Devine v. Los Angeles, 202 U. S. 313, 26 Sup. Ct. 652 (1906); Boise Artesian Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 29 Sup. Ct. 426 (1909). But *cf.* Blair v. Chicago, 201 U. S. 400, 26 Sup. Ct. 427 (1906).

[38] Bardon v. Land & River Impr. Co., 157 U. S. 327, 15 Sup. Ct. 650 (1895); Holland v. Challen, *supra* note 36; Case of Broderick's Will, 21 Wall. 503 (U. S. 1874); see Borchard, *op. cit. supra* note 4, at 30.

will has been extended by statute to deeds and other written instruments, where no other relief is given,[39] and where no questions of trust are involved.[40] A Connecticut statute has provided for an action by any claimant of an interest in real or personal property against any adverse claimant to determine such adverse claim and quiet title.[41] A Minnesota statute permits the holder of a fee title to bring an action against the holder of a tax title to determine such claim without, as was formerly necessary, paying into court the amount for which the land was sold at the tax sale.[42] There is also the equitable action to establish and confirm title in the case of lost records and under other circumstances.[43] There is the action by which an equitable claimant may obtain a judgment impressing a trust upon the legal title in his favor,[44] and the action to declare a supposed trust invalid.[45] There are actions to affirm the validity of a marriage denied or doubted by the other party.[46] And on occasions injunctions have issued against the mere existence of unconstitutional statutes, in one case even where the statute was not to go into effect for several years.[47] Where new equitable rights have been thus created in the states by statutory extensions of existing remedies the federal courts have occasionally given them effect.[48] When our courts are daily adjudicating such suits on their merits, can it be questioned that cases or controversies are therein presented? In so far as no other relief is awarded these are in effect declaratory judgments. The declaratory action is merely a new name for a form of remedy thus long known to English and American practice.

With the exception of the *Anway* case in Michigan[49] the state

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[39] In re Ungaro's Will, 88 N. J. Eq. 25, 102 Atl. 244 (1917). The court regards this statute as effecting an extension of the remedy rather than of jurisdiction.

[40] Barton v. Barton, 283 Ill. 338, 119 N. E. 320 (1918); ILL. REV. STAT. (Cahill, 1927) c. 22, § 50.

[41] Ackerman v. Union & New Haven Tr. Co., 91 Conn. 500, 100 Atl. 22 (1917); CONN. GEN. STAT. (1918) § 5113.

[42] Deaver v. Napier, 139 Minn. 219, 166 N. W. 187 (1918); MINN. STAT. (Mason, 1927) c. 82, § 9556.

[43] ILL. REV. STAT. (Cahill, 1927) c. 116, § 16.

[44] Porten v. Peterson, 139 Minn. 152, 166 N. W. 183 (1918); Donohoe v. Rogers, 168 Cal. 700, 144 Pac. 958 (1914).

[45] Scheibner v. Scheibner, 199 Mich. 630, 165 N. W. 660 (1917).

[46] WIS. STAT. (1927) § 247.03; Kitzman v. Kitzman, 167 Wis. 303, 166 N. W. 789 (1918).

[47] Pierce v. Society of Sisters, 268 U. S. 510, 45 Sup. Ct. 571 (1925); see Comment (1927) 36 YALE L. J. 845, 850.

[48] *Supra* note 38. But *cf.* Wehrman v. Conklin, 155 U. S. 314, 15 Sup. Ct. 129 (1894), as to how far such statutes conflict with the Constitutional provision entitling parties to a trial by jury.

[49] Anway v. Grand Rapids Ry., 211 Mich. 592, 179 N. W. 350 (1920), 12 A. L. R. 26 (1921); Comment (1926) 35 YALE L. J. 473.

courts have uniformly upheld the constitutionality of declaratory judgment acts, with emphasis on the fact that such actions present a justiciable issue, adverse parties, and a final judgment,[50] —in short, a case or controversy. The same conclusion was reached by the English Court of Appeal in the leading *Hannay* case referred to above.[51] There the question was whether the Rules Committee had power to authorize the courts to entertain such suits where no consequential relief could be had. The court held that it had such power, as the declaratory action involved merely an extension of practice and procedure, not of jurisdiction. Thus the promulgation of a simple rule of court was all that was required in England to adopt the declaratory action. The Judicial Council of Massachusetts appears to feel that no more is required to adopt it in that state.[52]

The fears entertained by the court in the *Anway* case that the action might not be confined to actual controversies have been dispelled. It should be noted that the proposed federal act begins with the phrase, "In cases of actual controversy." Now that over two thousand declaratory judgment cases have been disposed of by the English and Dominion courts, and several hundred by the American state courts, the nature of the action is no longer a matter of conjecture. So far we have been speaking of cases in which no other relief beyond the declaratory judgment is asked or could be had. But there is another type of declaratory judgment case—and, as it happens, a far more common type in the courts which render declaratory judgments, —in which the milder form of relief is sought in lieu of or as an alternative to consequential or injunctive relief.[53] *A fortiori* the suits of this second type present cases or controversies.

Should the question of the constitutionality of the proposed Federal Declaratory Judgment Act be presented to the Supreme Court, it is to be hoped that the extremely narrow construction placed by way of dicta upon the terms "case" and "controversy" may not be hardened into precedent to bar this useful action from the federal courts.

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[50] Blakeslee v. Wilson, 190 Cal. 479, 213 Pac. 495 (1923); Miller v. Miller, 149 Tenn. 463, 261 S. W. 965 (1924); Kariher's Petition, 284 Pa. 455, 131 Atl. 265 (1925); see Comment (1927) 36 YALE L. J. 845, 847.

[51] *Supra* note 17.

[52] "A method of gradual experiment under rules of court will be the simplest method of proceeding [to adopt the declaratory judgment] . . . We believe that a statute thus extending the rule-making power of the court to provide for such procedure would avoid the feeling in the minds of some members of the bar that a statute such as the proposed Uniform Act . . . might involve an uncertain extension of the relative jurisdictions of the courts of law and equity." *Third Report of the Judicial Council of Massachusetts*, 57.

[53] See Comment (1927) 36 YALE L. J. 403.